

Ann Brower and Ike Kleynbos

CHANGES in Urban and Environmental Governance

in Canterbury from 2010 to 2015: comparing Environment Canterbury and Christchurch City Council

This article compares the proximate but not parallel trajectories of Canterbury Regional Council's (ECan) and the Christchurch City Council's changing authority to manage the urban and natural environment from 2010 to 2015. We ask why the trajectories are so far from parallel, and speculate as to why the central government interventions were so different. The apparent mismatch between the justifications for the interventions and the interventions themselves reveals important implications on the national and local levels. Nationally, the mismatch speaks to the current debate over an overhaul of the Resource Management Act. Locally, it informs current discussions in Wellington, Nelson, Gisborne and elsewhere about amalgamating district and regional councils.

Background

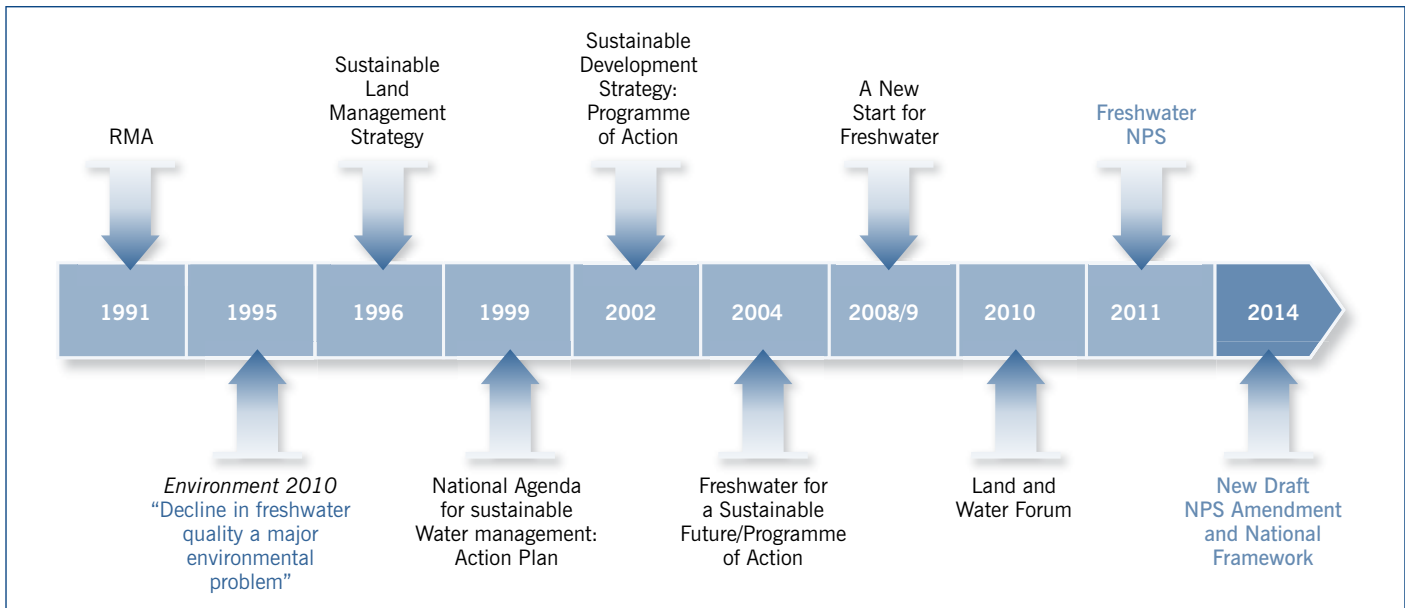
Between 2010 and 2012, Canterbury Regional Council and the Christchurch City Council faced governance crises. The former was accused by Canterbury's Mayoral Forum of failing to produce a plan for resource use and of processing resource consents slowly. The latter experienced an 18-month spate of earthquakes that left 80% of the buildings in the central business district on the to-be-demolished list. In the February 2011 quake there were also 42 deaths in city streets, and 133 deaths in city inspected buildings.

In one case the government intervened by suspending local elections indefinitely, replacing the councillors, suspending some jurisdiction of the Environment Court and parts of national legislation in Canterbury, and changing rules for water conservation and use. In the other case, local elections and council remained intact, while emergency powers were

Ann Brower is a Senior Lecturer in Environmental Policy at Lincoln University. She holds a PhD from the University of California, Berkeley, and a master's from Yale.

Ike Kleynbos holds a Bachelor of Environmental Management and Planning degree from Lincoln University and is currently doing postgraduate studies at Lincoln.

Figure 1: Freshwater Policy: 20 years of policy development and decisions



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granted to a new government department for five years.

One might expect the more drastic and long-lived central government intervention in response to the more drastic crisis. Canterbury defies such expectation. Though the justification for intervention appeared stronger in the earthquake, the less life-and-death crisis received the more drastic intervention. We explore this difference. We find that government interventions go well beyond who is at the top. The method of choosing who is at the top (local elections or government appointment) is but a small part of the changes in natural resource rules in Canterbury. We propose that there might be broader motives, with national implications, for the changes in Canterbury governance, and for the differences observed. Those other motives might be as simple as facilitating irrigation approvals, or as far-reaching as using Canterbury as a testing ground for national changes to environmental laws.

Christchurch and Canterbury before 2010

Under normal circumstances in New Zealand the authority to manage water, soil, geothermal resources, natural hazards, pollution, coastal management, land use, subdivision and hazardous substances is devolved and delegated to district and regional councils by way of the Resource Management Act 1991 (RMA). Those district and regional councils

enjoy reasonable autonomy, with flexible direction from central government.

The Resource Management Act aims to 'promote the sustainable management of natural and physical resources' (section 5). The RMA's governance structure allows the government to provide central guidance to district and regional councils in the form of national policy statements (NPS) on resources such as freshwater, biodiversity and the like. Regional councils then use the NPS to establish regional goals (in a regional policy statement); then district councils work within and implement both the national and regional policy statements. This planning hierarchy establishes a system in which local authorities make decisions within central guidelines.

However, these national policy statements have been slow to arrive (see Figure 1). Thus, for freshwater and other resources the RMA planning hierarchy has had little at the top (Oram, 2007; Memon and Gleeson, 1995). This lack of central direction has led local and regional authorities to facilitate strategic land use policy through the Local Government Act 2002, as it offers broader strategic tools than the RMA (Swaffield, 2012). Examples of this include the current Greater Christchurch Urban Development Strategy, and Christchurch's 2006 Central City Revitalisation Strategy. They are strategic attempts to create planning certainty within Christchurch through

the direct intervention of a territorial authority.

Perhaps more concerning, this lack of central planning guidance unintentionally reverses the intended hierarchy of the RMA. Rather than planning within the intended hierarchy, communities are instead forced through a bottom-up approach of case-by-case decision-making with its attendant inefficiencies and inequities (Brower, 2008, pp.57-8).

Between 2010 and 2012 both ECan and the Christchurch City Council faced governance crises deemed to be so pressing that the central government intervened. Thus, 'normal circumstances' described above started to change in April 2010 with the passage of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (ECan Act). They changed again in September 2010 and March 2011 with passage of the first and second earthquake acts.

Environment Canterbury

Let us start with the regional council, Environment Canterbury or ECan. Section 30 of the RMA authorises Ecan, like all regional governments, to manage the water, air and coastal resources of the region. The ECan Act replaced the ECan councillors with government-appointed commissioners, suspended regional elections, suspended jurisdiction of the Environment Court over certain types of decisions, allowed the minister

to selectively suspend sections of environmental law, and changed the rules for river protection (Brower, 2010). The statute set an expiry date, of 2013. In 2013 Parliament amended the act to extend the expiry date to 2016 (Public Act 2013 No. 6). In 2015 Cabinet proposed another amendment, not an expiration. None of this applied to other regions; neither was it quake-induced; nor did it happen overnight.

In 2009 the government commissioned a review of the RMA which suggested abolishing regional councils altogether (Gorman, 2009b). Amy Adams, now minister of justice, reminded then (and now) minister for the environment Nick Smith that the government held the power to sack poorly performing regional and district councils, with solid evidence of that poor performance (*ibid.*). Smith then threatened to use these powers if ECan failed to speed up consents-processing. Governments had sacked councils before, without special legislation (Staff, 2000, 2001). The communications officer of the Department of Internal Affairs, Tony Wallace, further reminded the public that the government could replace the council only in cases of 'significant and identifiable mismanagement of the resources of the local authority, or [inability] to perform and exercise its duties' (Gorman, 2009b).

Later in 2009 the Canterbury Mayoral Forum wrote to Smith asking for central government intervention in ECan. The government inquiry, led by former National deputy prime minister Wyatt Creech (Gorman, 2009e), suggested 'a new regional authority to handle all water issues', echoing the government's review of the RMA eight months earlier (Staff, 2010). It argued that ECan had suffered from the 'gold rush' effect of the 'first come, first served' case-by-case decision-making for water rights, which slowed consent processing. Creech (Creech *at al.*, 2010) found no current and ongoing substance to the mayors' criticism, instead expressing optimism that systems had been sufficiently amended to allow for adequate consent processing.

Creech was most concerned by the council's ability or otherwise to create effective regional policy. At the time, ECan was in the midst of both reviewing its

regional policy statement and creating its natural resources regional plan.¹ Different teams were working on the different plans, creating potential for conflict. Creech argued that this highlighted ECan's inability to create definitive and durable regional policy.

Many have said that the Creech report prompted the ECan Act. But Smith did not need special legislation to replace ECan councillors with commissioners; his government held the power. There are several reasons the government might have gone to the trouble of special legislation to create powers it already had. Perhaps it: 1) was not confident that ECan had breached legislative thresholds; or 2) had other goals. Understanding the rest of the ECan Act sheds light on the

Parliament to abdicate its authority, by delegating to the political executive (minister for the environment) the power 'to make regulations suspending, amending, or overriding primary legislation' (Joseph, 2007, p.503). New Zealand constitutional law scholar Philip Joseph calls this type of clause 'constitutionally objectionable where they are used for general legislative purposes' (Joseph, 2010, p.195).

Section 52 then restricts Cantabrians' access to the Environment Court. Under the ECan Act, Cantabrians can no longer appeal the substance of regional government decisions about water conservation orders (WCOs) and the regional plan and policy statements. While all other of the ECan Act's provisions were

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possibility of those other goals.

Section 31 of the ECan Act gives the minister for the environment the power to decide where and when environmental law applies in Canterbury. The 'transitional regulations' of section 31 give the minister the power to specify that certain sections of the RMA 'do not apply, despite being applied under this Act; or do apply, despite not applying under this Act' (section 31(b)(i)(A, B)). Constitutional law scholars call section 31 a 'Henry VIII clause', because it creates the authority to dis-apply the empowering legislation (the RMA) selectively and at will without recourse to Parliament (Geddis, in Gorman, 2010). This is akin to selectively beheading inconvenient sections of the RMA, as dear old Henry beheaded inconvenient wives.

Section 31 gives supremacy to subordinate legislation (ECan Act) over primary legislation (RMA). It also allows

meant to expire at the next election, even with its flexible date and form, section 46(4) excludes the Environment Court from Canterbury water conservation order proceedings. Section 46(4(a)) directs that the revocation of appeals to the Environment Court on WCOs will continue to apply even after the next election (Brower, 2010). This removes the court's 'sober second look' (Waldron, 2008) at the substance of environmental decisions, and risks compromising the quality of decision-making under the RMA in Canterbury. In the end section 46(4) mattered little, as the non-electoral provisions are set to outlast the electoral provisions.

Section 46 also changed the rules for new WCO applications.² In all other regions of New Zealand regional councils must prioritise protection of a river's nationally outstanding ecological, recreational, cultural, or wild and scenic

characteristics before allowing resource use, unless the economic potential was important on a national scale.³ The ECan Act changed the order, so that conservation loses its priority status. In other words, it took the conservation out of water conservation orders. But again, this was only in Canterbury. A resource management lawyer acting for the Fish and Game councils of New Zealand commented on Radio New Zealand: 'it's still a possibility that those iconic rivers will remain protected, but I wouldn't bet ... on it' (Baker, quoted in Pettie, 2010).

The Environment Court appeal on the Hurunui River water conservation order was scheduled to begin on 30 May 2010. Parliament passed the ECan Act

appointed commissioners. Smith said this model for Ecan

enables a majority of elected representatives while ensuring continued momentum on the Canterbury Water Management Strategy and earthquake recovery work. We considered other options of a fully elected council and alternatives that involved substantive changes to council functions. Our preliminary view is that these carry too many risks given the critical stage of work on the Canterbury Water Management Strategy and the earthquake recovery. (Pearson, 2015a)

body in 2016, to extend the special powers. This could ensure that there is no period in which there is a need for a return to the standard resource management arrangements before the RMA reforms are implemented. To return to standard RMA arrangements for just a short period may be an inefficient use of resources and a source of confusion for Canterbury communities and other users of the resource management system. (Ministry for the Environment, 2015, p.22)

Whether this statement foreshadows the future of the RMA remains to be seen. If it does portend the contents of already-signalled changes to the RMA, then we might see the rest of New Zealand following the Canterbury model, with its bottom-up collaborative approach to water management in the Canterbury water management strategy and its top-down directive approach to representation in its mixed-governance model. If this comes to pass it would be legislation by synecdoche. Deborah Stone describes synecdoche, a type of symbolism that represents the whole by one of its parts, as common in politics:

Politicians or interest groups deliberately choose one egregious or outlandish incident [such as Canterbury water] to represent the universe of cases, and then use that example to build support for changing an entire rule or policy that is addressed to the larger universe [of natural resource management in all of New Zealand]. ... As with other forms of symbolic representation, the synecdoche can suspend our critical thinking. ... The strategy of focusing on a part of a problem ... is likely to lead to skewed policy. Yet it is often a politically useful strategy ... because it can make a problem concrete, allow people to identify with someone else, and mobilize anger. Also it reduces the scope of the problem and thereby makes it more manageable. (Stone, 2002, pp.146-8)

In its resemblance to a cart leading its horse, legislating by synecdoche turns the

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under urgency in April and changed the rules at half-time on the Hurunui. Jurists view shifting the goalposts at half-time as constitutionally objectionable because it violates the principle of equal application of the law (Joseph, 2007, p.212).⁴ In other words, the non-electoral provisions of the ECan Act – the authority granted in section 31 to selectively not apply the RMA, the supremacy of subordinate regional legislation, the partially suspended jurisdiction of the Environment Court, and half-time changes to river protection rules – change the shape of regional democracy in Canterbury more than suspending elections did.

On 18 March 2015 Nick Smith released a discussion document proposing a plan for the future of ECan, and invited public submissions. The proposal is to impose a mixed-governance model, with seven elected councillors (in 2016) and six

On 22 June 2015 Cabinet considered and affirmed the proposal (Staff, 2015).

Under the new structure ECan would still enjoy the extra powers, the non-electoral provisions described above. The report also hints, rather openly, that the soon-to-be-released reforms to the RMA will spread Canterbury's special powers, and perhaps its mixed-governance model, around the country. The report states:

Since the review provisions in the ECan Act came into force, reforms have been proposed to the RMA, which if enacted, would make planning and consenting functions more efficient and effective and will remove the need for the new governing body to have special power. However, a transitional arrangement could be put in place for [Canterbury's] new governing

RMA's intended planning hierarchy on its head. Further, it gives policy supremacy to a subsidiary region.

Christchurch City Council

Given the government's keen attention to leading the ECan cart to remediate apparent regional policy failures, one would expect similarly enthusiastic attention to the local Christchurch City Council's troubles following the earthquakes of 2010-2011. The government faced many of the same issues with the Christchurch City Council as it had with ECan – after the September 2010 quake, after the February 2011 quake, and in the building consents crisis of 2013. In each of these cases the government created special powers for the city and district councils, by way of orders in council (Canterbury Earthquake Response Recovery Act 2010), and later for itself (Canterbury Earthquake Recovery Authority Act 2011). But it never sacked the councillors themselves, even though in January 2012 one councillor called for the Christchurch City Council to be disbanded (Gorman and Sachdeva, 2012). CERA – the Canterbury Earthquake Recovery Authority – is due to last only five years and the building consents commissioner stayed just one year, compared to ECan's six and counting.

In contrast to the electoral changes introduced by the ECan Act, which had legal foundations in active statute and precedent, the special powers during a prolonged disaster recovery were not foreshadowed by the Civil Defence and Emergency Management Act. Hence Parliament needed to create them by legislation (Brookie, 2012, p.20; Rotimi, 2010, pp.18-20), just as it needed legislation to enact the non-electoral provisions of the ECan Act described above.

Between 4 September 2010 and 22 February 2011

When the ten-day state of emergency after the 4 September 2010 earthquake ended, Parliament passed the Canterbury Earthquake Response and Recovery Act 2010 (CERR Act, or first earthquake act) under urgency. Section 6 allows the executive to administer quick orders in council that 'may make exceptions from,

modify or extend the provisions of any New Zealand statute'.

The orders in council tool in section 3(c) allowed for as-needed and on-demand legislative changes to speed recovery or enhance public safety in the streets of Christchurch, without consultation with Parliament. These exceptions to laws on the books were not limited to public safety or securing the essentials of life, as one might expect in an extended state of emergency. Indeed, critics warned that the expansive powers were vulnerable to abuse (Geddis et al., 2010), and that they granted ministers the 'unfettered right to legislate by decree' (Public Issues Committee of the Auckland District Law

for demolishing, constructing or altering buildings. Under CERR Act authority, the Crown issued 14 orders in council amending or repealing existing legislation and regulations, in fields as diverse as resource management, civil defence, historic places and local government. The city council used the special powers granted by orders in council to demolish buildings threatening public safety only three times.⁵ Many judged the council harshly for this (Heather, 2012).

After 22 February 2011

The Canterbury Earthquake Recovery Act 2011 (the CERA Act, or second earthquake act) created many of the same

In the wake of the series of earthquakes that left 80% of the buildings in the Christchurch CBD on the to-be-demolished list, the Christchurch City Council faced a predictable flood of building consent applications.

Society, 2010). Echoing constitutional concerns over the ECan Act six months earlier, the Auckland District Law Society said: 'for Parliament to transfer such extensive powers to the Crown, and thereby abdicate its own responsibility on behalf of the people, is constitutionally very questionable' (ibid.). The only constitutional law academic who signed the letter objecting to the constitutional 'repugnance' of the ECan Act, but did not sign Andrew Geddis's open letter of concern about the first earthquake act, was University of Canterbury professor Philip Joseph (Geddis et al., 2010). To Joseph, the circumstances of the latter were sufficiently different to and more grave than the former that it was more appropriate to invoke the flexible nature of New Zealand's constitutional arrangements in crafting an effective and equitable response.

Before the CERR Act, Christchurch City Council was bound by the RMA to follow procedures and consent processes

special powers that the first earthquake act had. But this time Parliament gave the powers to a new government department – CERA – and instructed councils to act 'as directed'. Further, the CERA Act gave CERA the power to: amend or revoke RMA documents and city plans; close or otherwise restrict access to roads and other geographical areas; demolish buildings; otherwise enter and manage risk on private land and property (with notice in the case of marae and dwellings); and require compliance of any person with a direction made under the act (Buddle Findlay, 2011). The Canterbury Earthquake Recovery Act expires in April 2016, though some of the special powers created by it might persist, according to the minister for earthquake recovery (New Zealand Government, 2014).

The building consents crisis of 2013

In the wake of the series of earthquakes that left 80% of the buildings in the Christchurch CBD on the to-be-

demolished list, the Christchurch City Council faced a predictable flood of building consent applications. In February 2012 the council announced that it had hired 69 new full-time staff to process consents (Christchurch City Council, 2012). By 1 July 2013 those extra staff were not enough. International Accreditation New Zealand revoked the council's accreditation, and the prime minister held a press conference announcing that he was revoking the council's authority to issue building consents. Revoking a council's authority was 'unprecedented', Key said, but, rather than take unilateral action through an act of Parliament, he, several ministers and officials would meet with the Christchurch City Council to put

intervention. Environment Canterbury faced challenges with plenty of precedent, and well-known roots in the national context. The government had several policy options for ECan, each fairly well-trodden paths. It could have followed RMA procedure – adopting national policy statement guidance. A slightly less well-trodden path was replacing elected councillors with appointed commissioners. It is well within the government's power to do so, if the council has documented deficiencies. Yet the government created its own path for ECan, passing special legislation under urgency.

Perhaps among the government's primary goals were the non-electoral

December 2011 (Heather, 2012). After the 22 February 2011 quake the government handed those same special powers, and more, to a new government department, which used them less sparingly. Then the government revoked consenting authority and replaced a council department for a year in the building consents crisis of 2013.

While the legislative framework surrounding the Christchurch earthquake response is set to expire in April 2016, the ECan anomaly is set to endure. According to our reading, the Ministry for the Environment's proposal for mixed governance seems to imply that the new ECan model will act as a transitional phase, until the proposed RMA reforms spread the non-electoral provisions of the ECan Act to the rest of the country. However, the changed numbers in Parliament following the 2015 Northland by-election might render the government unable to pass its preferred changes.

Allowing the Canterbury case study to guide national legislation looks like legislating by synecdoche.

'options on the table and seek ... council agreement with a proposed course of action' (Key, quoted in Cairns and Young, 2014). Within a fortnight the government had appointed a Crown manager to oversee the building consents department for one year, and the Christchurch City chief executive, Tony Maryatt, had been put on 'gardening leave' indefinitely (Bayer, 2013).

To some commentators' mild surprise, the elected councillors and their mayor kept their jobs throughout (McCrone, 2015).

Discussion

It is timely and instructive to compare the trajectories of Christchurch and Canterbury. It is particularly so as Christchurch looks to a post-CERA city, Canterbury looks to partial regional elections, the government looks set to reform the RMA, and discussions around amalgamation continue in Wellington and elsewhere.

In Christchurch the government faced, and still faces, an unprecedented challenge. Most expected government

provisions of the ECan Act, which changed water conservation orders and affected applicability of both the Environment Court and sections of the RMA. The minister of agriculture at the time, David Carter, said as much in a 2010 speech to Irrigation New Zealand:

I would have thought what happened recently with Environment Canterbury would be a signal to all regional councils to work a bit more constructively with their farmer stakeholders ... We had to act here in Canterbury because the situation was untenable if we are going to seriously make progress in delivering this irrigation. (Carter, quoted in Williams, 2010)

Although 2016 will see partial regional elections return to Canterbury, the non-electoral provisions will remain.

A few months after the ECan Act was passed, the government created special emergency powers for Christchurch City Council, which used them sparingly after the major quakes of 4 September and 26

Conclusion

We are not arguing that any of these actions were frivolous or unnecessary. We note with interest the apparent over-legislation for ECan and under-legislation for Christchurch City Council. There is a discrepancy between well-trodden actions the government could have taken in replacing elected councils, and the actions the government took for ECan instead. This discrepancy suggests that in amalgamation talks, territorial authorities would be wise to be careful what they wish for.

The Canterbury comparison has broader implications for national environmental law and legislative style. The government's 2015 proposed amendment to ECan governance hints that many of the non-electoral provisions of the ECan Act will be echoed in RMA amendments foreshadowed for 2015. Allowing the Canterbury case study to guide national legislation looks like legislating by synecdoche. This echoes constitutional scholars' criticism of the Henry VIII clause, section 32, of the ECan Act. Legislating by synecdoche gives supremacy to a subordinate regional governance model. In other words, it would be the national horse leading the

regional cart from 2010–2015, until the regional cart is able to reform the entire national horse. The former is well within the RMA governance model; the latter is less so.

- 1 The NRRP was 'stuck' in its schedule 1 phase, therefore still in development and not notified yet. The worry was that when it was notified, it would clash with the regional policy statement. Option 1 of the Creech report suggests the creation of the Canterbury Regional Water Authority, which would create the plan (and the report details how the plan should work), and integrate with the 'remaining sections of the NRRP' (Creech et al., 2010, p.16).
- 2 Section 199 of the RMA defines WCOs as follows: 'the

purpose of a water conservation order is to recognise and sustain –
(a) outstanding amenity or intrinsic values which are afforded by waters in their natural state;
(b) where waters are no longer in their natural state, the amenity or intrinsic values of those waters which in themselves warrant protection because they are considered outstanding.
(2) A water conservation order may provide for any of the following:
(a) the preservation as far as possible in its natural state of any water body that is considered to be outstanding;
(b) the protection of characteristics which any water body has or contributes to, and which are considered to be outstanding, –
(i) as a habitat for terrestrial or aquatic organisms;
(ii) as a fishery;

(iii) for its wild, scenic, or other natural characteristics;
(iv) for scientific and ecological values;
(v) for recreational, historical, spiritual, or cultural purposes;
(c) the protection of characteristics which any water body has or contributes to, and which are considered to be of outstanding significance in accordance with tikanga Maori.'
3 The priority for protection arises from the requirement that 'particular regard' be given to section 199, and then that only 'regard' be given to the matters listed in section 207(a)–(c).
4 Citing Thomas J in R v Poumako [2000] 2 NZLR 695 at 712–713.
5 Christchurch City Council testimony at royal commission hearings.

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